

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:NER:NED:BOS:TL-N-2498-99
BJLaterman

date:

to: Charlie Marcou, Team Coordinator
Attn: Theresea Gorey, Case Manager, Group 1102

from: District Counsel, New England District, Boston

subject:

Taxable Years: [REDACTED] and [REDACTED]

Statute Expires: [REDACTED]

This is in response to your request that we provide advice regarding extending the statute of limitations for the above-mentioned corporation's taxable years [REDACTED] and [REDACTED].

[REDACTED] (Limited) is a U.S. Virgin Islands corporation. It is a wholly owned by [REDACTED] ([REDACTED]) and it filed a Form 1120-FSC for the taxable years [REDACTED] and [REDACTED].

[REDACTED] is a Delaware corporation. The [REDACTED] ([REDACTED]) is a Delaware corporation which filed its federal income tax returns as the parent of a consolidated group. All of [REDACTED]'s stock was acquired by [REDACTED] in [REDACTED]. [REDACTED] did not file as a member of the [REDACTED] consolidated group.

Limited was dissolved on [REDACTED]. All of the assets and liabilities of Limited were transferred to [REDACTED].

On [REDACTED], pursuant to the General Corporation Law of the State of Delaware, [REDACTED] merged [REDACTED], its wholly owned subsidiary, into itself. Pursuant to the merger, [REDACTED] agreed to assume all of [REDACTED]'s liabilities and obligations.

I.R.C. § 6901 provides that the liability at law or in equity of a transferee of property may be assessed and collected in the same manner as in the case of the taxes with respect to which the liability was incurred. The term "transferee" includes the shareholders of a dissolved corporation. Treas. Reg. § 301.6901-1(b).

Limited was at all times a wholly owned subsidiary of [REDACTED]. Upon dissolution of Limited all of its assets and

liabilities were distributed to its sole shareholder. [REDACTED] would be included in the term transferee as the "shareholder of a dissolved corporation." Treas. Reg § 301.6901-1(b).

I.R.C. § 6901 does not create any separate liability but merely provides a method for enforcing such liability as may be created under other federal or state laws. Phillips v. Commissioner, 283 U.S. 589 (1931). The burden of proof is on the Government to establish transferee liability. The execution of a Transferee Agreement (Form 2045) in which an admission of transferee liability is made satisfies this burden.

Rev. Rul 83-41, 1983-1 C.B.399 provides that shareholders liable under I.R.C. § 6901 as transferees may sign consents for their own liabilities. Accordingly, [REDACTED], a shareholder and transferee of the assets of Limited, may sign a Form 977 (Consent to Extend the Time to Assess Liability at Law or in Equity for Income, Gift and Estate Tax Against a Transferee or Fiduciary).

The Service should obtain the Forms 977 and 2045 from [REDACTED] for [REDACTED] since [REDACTED] is the successor in interest by merger to [REDACTED]. [REDACTED] succeeds to [REDACTED]'s liabilities and obligations for [REDACTED] and [REDACTED] under state law and pursuant to the terms of the merger.

Both [REDACTED] and [REDACTED] are Delaware corporations. Since the merger was effected under Delaware law, [REDACTED] is primarily liable for [REDACTED]'s debts, including taxes due. Southern Pacific Transportation Co. v. Commissioner, 84 T.C. 387(1985), later proceeding, 90 T.C.771 (1988). Section 259 of the Delaware General Corporation Law provides in part,

(a) When any merger or consolidation shall become effective under this chapter, ... all rights of creditors and all liens upon any property of any said constituent corporations shall be preserved unimpaired, and all debts, liabilities and duties of the respective constituent corporations shall thenceforth attach to said surviving or resulting corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it.

DEL. CODE ANN. tit. 8, § 259 (1991).

The Forms 977 and 2045 should indicate that [REDACTED] is successor in interest to [REDACTED] (E.I.N. XX-XXXXXXX). The signatures on the Forms should

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indicate the following: [REDACTED] successor in interest to [REDACTED].

The regulations under I.R.C. § 6501(c)(4) do not specify who may sign consents executed pursuant to that section. Accordingly, the Service will apply the rules applicable to the execution of the original returns to the execution of consents to extend the time to make an assessment. Rev. Rul. 83-41, 1983-1 C.B. 399, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305.

In the case of corporate returns, I.R.C. § 6062 provides that a corporation's income tax returns must be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to act. The fact that an individual's name is signed on the return is prima facie evidence that the individual is authorized to sign the return. I.R.C. § 6064. However, any officer listed above may sign a consent, whether or not that person was the same individual who signed the return. Rev. Rul. 84-165, 1984-2 C.B. 305. Consequently, the Forms 977 and 2045 should be signed by an officer of [REDACTED].

If we can be of any further assistance, please feel free to call the undersigned at 617-565-7838.

BARRY J. LATERMAN
Special Litigation Assistant